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No. 77.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

MOOG INDUSTRIES, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION.

On Writ of Certiorari to the United States Court of Appeals for the 8th Circuit.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The initial decision of the Hearing Examiner for the Federal Trade Commission appears at R. 59-77. The opinion on appeal to the Federal Trade Commission appears at R. 79-90. The dissenting opinion of Commissioner Mason appears at R. 91-95. The final order of the Federal Trade Commission appears at R. 78. The opinion of the Court of Appeals (R. 507 et seq.) is reported at 238 F. 2d 43.

JURISDICTION.

The judgment and order of the Court of Appeals was entered on November 29, 1956 (R. 523). Petitioner's motion to hold judgment and order in abeyance or for the Court to exercise its equitable jurisdiction was denied by the Court of Appeals November 29, 1956 (R. 522).

On Petitioner's motion issuance and transmittal of decree to the Federal Trade Commission was ordered withheld by the Court of Appeals on December 17, 1956, for thirty (30) days to permit application to Supreme Court for writ of certiorari (R. 524), and on petitioner's motion, the Court of Appeals entered its order on January 14, 1957, further extending the time to apply for certiorari for twenty (20) days from January 16, 1957 (R. 525). A petition for a writ of certiorari was filed on February 4, 1957, and was granted on March 25, 1957, limited to question four presented by the petition for the writ (R. 525).

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), and 15 U. S. C., Section 21.

QUESTION PRESENTED.

The Federal Trade Commission on December 20, 1949, filed its complaint against petitioner alleging price discrimination between its customers in violation of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, Title 15, Sec. 13 (a), U. S. C. (49 Stat. 1526) (R. 1). The petitioner was giving annual volume discounts to all its customers according to published table of discounts applicable to the annual volume purchased (R. 62-63). This practice in one form or another is traditional and standard throughout the automotive replacement parts industry. The Court of Appeals affirmed the order of the Federal Trade Commission ordering petitioner to cease and desist from price discrimination and

ordered petitioner to file with the Federal Trade Commission its certificate of compliance sixty (60) days from the date of issuance of certified copy of the decree to the Federal Trade Commission (R. 523). Petitioner filed its motion with the Court of Appeals to hold its judgment and order in abeyance and to exercise its equitable jurisdiction and to suspend the same until its numerous competitors, who are continuing to give volume discounts to their customers can be subject to a similar order (R. 521). The Court of Appeals denied this motion (R. 522) and entered the judgment and order requiring compliance in sixty (60) days as noted above (R. 523).

The question presented is whether petitioner is entitled to have the Court of Appeals order of compliance held in abeyance or suspended until its numerous competitors, who are using similar forms of volume discounts, are subjected to similar orders—and whether the Court should exercise its statutory power and original equity jurisdiction to protect petitioner from an inevitable loss of customers and business to its competitors who are free to continue to offer volume discounts; and whether the action of the Court of Appeals in denying petitioner's motion to hold its order in abeyance is inequitable, unjust and unfair.

CONSTITUTION, STATUTES AND RULES INVOLVED.

Constitution of the United States, Article III, Section 2. (See appendix.)

Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13 (a). (See appendix.)

Clayton Act, Sec. 11, 38 Stat. 734, as amended by Robinson-Patman Act, 15 U. S. C., Section 21. (See appendix.)

Rules of Practice and Procedure of Federal Trade Commission (May, 1955), Subpart c, Sections 2.21-2.232, inclusive, page 17 et seq. (See appendix.)

STATEMENT.

The petitioner, with its principal office and manufacturing plant in St. Louis, Missouri, is in the business of manufacturing, selling and distributing automotive replacement parts to purchasers located in various parts of the United States and the District of Columbia (R. 127-128); most of the parts so sold are manufactured in its own plant, but some of the parts so sold are purchased for resale (R. 129-442). It is now and has for many years prior to the effective date of the Robinson-Patman Act (June 19, 1936), been continuously engaged in this business. Petitioner is in competition with other corporations, firms and persons who are manufacturing, selling and distributing similar automotive replacement parts in Interstate Commerce throughout the United States.

The Federal Trade Commission filed its complaint against petitioner December 20, 1949, charging in substance that the petitioner was discriminating in prices between different purchasers and that such act substantially tended to lessen, injure and prevent competition in violation of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C., Section 13A (R. 1).

After hearings were had before the Hearing Commissioner, initial decision (R. 59) and order rendered, and appeal taken to the full Commission, the Commission issued its cease and desist order, requiring petitioner to file its certificate of compliance within sixty (60) days thereafter (R. 76-78). On review before the Court of Appeals, the decision of the Federal Trade Commission was affirmed (R. 507-520). Petitioner filed its motion to hold the judgment and order in abeyance until its competitors were subjected to similar orders as such volume or quantity

discount pricing system was standard and part and parcel of the automotive replacement parts industry, otherwise, petitioner would face loss of customers and business and resultant financial loss and would itself be subject to price discrimination and unfair competition, which is the very result which the Robinson-Patman Act was enacted to prevent (R. 521). This motion was denied by the Court of Appeals and its decree and order was entered affirming the order of the Federal Trade Commission, and further ordering petitioner to file its certificate of compliance with the Federal Trade Commission within sixty (60) days from the date of the issuance of certified copy of decree to the Federal Trade Commission (R. 523). Thereafter, petitioner in due time and within the period provided by law applied to the Supreme Court for certiorari, presenting four questions therein, the fourth question covering the denial by the Court of Appeals of its motion to hold its order in abeyance and for equitable treatment, and showing that such ruling under identical circumstances was contrary to the rulings of the Court of Appeals in other circuits as follows:

C. E. Niehoff & Co. v. Federal Trade Commission, 241 F. 2d 37 (7th Cir.);

Indiana Quartered Oak Co. v. Federal Trade Commission, 58 F. 2d 183-184 (2nd Cir.);

Butterick v. Federal Trade Commission, 4 F. 2d 910, 913 (2nd Cir.);

Natural Gas Pipelines Co. v. Federal Power Commission, 128 F. 2d 481-484 (7th Cir.).

The Supreme Court granted certiorari limiting it to the fourth question therein, relating to the denial by the Court of Appeals of petitioner's motion to hold the judgment in abeyance until its competitors could be subjected to similar orders (R. 525).

The petitioner gives annual volume discounts to all of its customers according to a published table of discounts or rebates applicable to the annual volume purchased (R. 62-63). This practice of giving volume discounts or rebates in one form or another is traditional and standard in the automotive replacement parts industry as practically all of Moog's competitors offer volume discounts or rebates in one form or another (R. 426, 429, 436, 444, 445, 446, 447, 448, 449, 462, 475, 476, 500, 501, 502, 503, 504). Some of the larger of Moog's competitors are:

Maremount Automotive Products
Tuthill Spring Co.
Burton Auto Springs
Eaton Products Co.
Ramsey Corporation
Hastings Manufacturing Co.
Sealed Power Corp.
McQuay-Norris Co.
Perfect Circle Corp.
Mopar (Chrysler Corporation)
Regal Manufacturing Co.
Geary Hershey Co.
Shefford Master Corp.
Thompson Products
General Motors, Chevrolet Division
Burton Auto Spring Corporation
Eaton Products of Cleveland

These are some of the larger companies who are Moog's competitors as mentioned in the testimony appearing in the Record at pages 446, 447, 448, 451, 452, 462, 472, 473, 474, 475, 501.

Typical of such discounts or rebates given by Moog's competitors is that shown by Respondent's Exhibits 10-B and 10-C, Regal Tool and Mfg. Co., Inc. (R. 526, 527, 528,

309); Respondent's Exhibit 16, Thompson Products, Inc. (R. 529-531, 473); and Respondent's Exhibits 18-A and 18-B, Thompson Products, Inc. (R. 532-535, 473); and Respondent's Exhibit 25-A, McQuay-Norris Manufacturing Co. (R. 477, 537).

Moog Industries, Inc., is one of the smaller manufacturers in the automotive replacement parts industry, its gross business being a little less than five million dollars in 1952 which is less than one per cent (1%) of the total sales volume in the industry (R. 474). The total volume of automotive replacement parts sold by the entire industry in 1952 was two and one-half billion dollars (R. 431). In order to be competitive Moog must meet its competitors' prices (R. 426, 427, 429, 445, 450) or be put out of business (R. 502). Moog, being in a secondary position because of its size, must follow the pricing practices of the industry or they would be out of business (R. 502). Moog's pricing schedule is arrived at from a competitive standpoint, costs considered (R. 427, 445, 450, 497, 498).

During the progress of the case and while it was on appeal before the full Federal Trade Commission, the petitioner, on April 16, 1954, with other manufacturers as one group and wholesalers in the industry as another group, in accordance with Subpart (c), Trade Practice Conference rules, Section 2.21 et seq., page 17, filed with the Commission their separate applications for a Trade Practice Conference requesting the Commission to grant a Trade Practice Conference to the automotive replacement parts industry in order to formulate trade practice rules and to deal among other things with unfair methods of competition and other alleged illegal practices. The Federal Trade Commission, up to the date of the writing of this brief, has failed to take any action on this application.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred by denying petitioner's motion to hold in abeyance its judgment and order of compliance until its competitors who were using the same volume discounts, could be subjected to similar orders; and further erred in failing to exercise its statutory and original equitable jurisdiction to protect the business life of petitioner.

SUMMARY OF ARGUMENT.

This proceeding involves the rights of petitioner to have an order of the Court of Appeals held in abeyance until petitioner's competitors are subjected to similar orders. The order in question required petitioner to cease and desist from price discrimination and to file its report of compliance therewith within sixty (60) days. The price discrimination consisted of the giving of volume discounts which are traditional and standard in the automotive replacement parts industry. Petitioner's competitors are free to continue such volume discounts while petitioner is subject to the order to refrain therefrom, thereby causing petitioner to be at a severe competitive disadvantage with consequent loss of business and customers. The Court of Appeals has both statutory and equitable jurisdiction to grant such relief. The action of the Court of Appeals is in direct conflict with the decision of the Courts of Appeals of other Circuits, particularly:

C. E. Niehoff & Co. v. Federal Trade Commission, 241 F. 2d 37 (7th cir., now on certiorari before this Court);

Natural Gas Pipelines v. Federal Power Commission, 128 F. 2d 481, 484 (7th cir.);

Indiana Quartered Oak Co. v. Federal Trade Commission, 58 F. 2d 183 (2nd Cir.);

Butterick v. Federal Trade Commission, 4 F. 2d 910 (2nd cir.);

L. B. Silver Co. v. Federal Trade Commission, 292 F. 752, 756 (6th cir.);

Century Metalcraft Corp. v. Federal Trade Commission, 112 F. 2d 443 (7th cir.).

To deny the petitioner the relief requested is not only inequitable, unfair and unjust, but would be a defeat of

the very purpose of the Robinson-Patman Act to protect a small business from its larger competitors. The United States and the Federal Trade Commission have heretofore in similar instances suspended orders of compliance until other competitors of the one proceeded against could be subjected to similar orders. The principles of equity should be applied here in order to protect the business life of petitioner.

ARGUMENT.

On the Facts in the Record, the Petitioner is Entitled to Equitable Relief Such as Was Given by Decisions in Other Courts of Appeals.

The Court of Appeals should have granted petitioner's Motion to Hold Its Judgment and Order in Abeyance. The Court of Appeals had ordered in its final decree that within sixty days from the date of issuance of certified copy of the decree to the Federal Trade Commission that the petitioner file with the Federal Trade Commission a report in writing setting forth the manner and form in which it complied with said order to cease and desist (R. 523). The record shows the extreme competitive disadvantage in which this would place petitioner while its competitors were still continuing to offer volume discounts thereby unquestionably causing it to lose customers and a consequent loss of money.

The Court of Appeals is given power by the Statute, 38 Stat. 734, 15 U. S. C., Section 21, to modify the orders of the Federal Trade Commission. The title of this section reads "Enforcement Provisions: Proceedings." After making provisions by which the Commission may enter its order to cease and desist and provision for review by the Court of Appeals, the section reads in part:

> "Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such persons, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board."

Later on the same section reads in part as follows:

> "Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or

modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order."

The next to last paragraph of said section 21 reads in part:

"The jurisdiction of the United States Court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive."

The very words of the statute, thrice repeated, confers upon the Court of Appeals the power to modify the Commission's order. It appears obvious, therefore, that the Court of Appeals has the power to modify by postponing the date when the order will take effect. Both the title of the section and the quoted words of the Statute clearly and unequivocally so state.

The Court of Appeals also has original equity jurisdiction to modify the Commission's order by temporarily suspending it upon facts which appear in the record. The Constitution of the United States vests original equity jurisdiction in United States Courts. Article III, Section 2, of our Constitution provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . ."

In **McConihay v. Wright**, 121 U. S. 201, 7 S. C. 940, 942, 30 L. Ed. 392, this Court said in referring to the equitable jurisdiction of the United States Courts:

"That jurisdiction as has often been decided is vested as a part of the judicial power of the United States in its Courts by the Constitution and acts of Congress in execution thereof."

Chief Justice Marshall in **Osborn v. United States Bank**, 9 Wheat. 738, page 819, 6 L. Ed. 204, construed Article III of the Constitution as follows:

"This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."

In **Old Colony Trust Co. v. Commissioner of Internal Revenue**, 279 U. S. 716, 49 S. C. 499, there was a certification by the Court of Appeals to this Court involving a review of a decision of the Board of Tax Appeals as to the jurisdiction of the Court and involving Article III of our Constitution. This Court held at page 722 of the U. S. Report that the proceedings on review before the Court of Appeals were judicial. The Court further held on the same page that the case was analogous to suits lodged in the Circuit Courts of Appeal upon petition or finding of an executive or administrative tribunal and it was not important whether such a proceeding was originally begun by an administrative or executive determination, if when it came to the Court, it called for only the exercise of the judicial power of the Court upon which jurisdiction was conferred by law.

On page 723 of the cited case the Court further held that the jurisdiction in that cause was like that of Circuit Courts of Appeal in review of orders of the Federal Trade Commission, citing in support:

Federal Trade Commission v. Eastman Kodak Co., 274 U. S. 623, 47 S. C. 688, 71 L. Ed. 1238;

Silver Co. v. Federal Trade Commission (C. C. A.), 292 F. 52.

The Court then quoted at page 724 of the cited case the opinion of Chief Justice Marshall in the Osborn Case which we have quoted above.

The most recent case where a Court of Appeals exercised both its statutory power and its original equity jurisdiction is **C. E. Niehoff & Co. v. Federal Trade Commission,** 241 F. 2d 37, 42 (7th Cir.), now pending on certiorari before this Court. The Court said at page 42 of the Reporter:

> "Niehoff's business will suffer economic extinction before the Commission adjudicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order."

The Court also stated on page 42 of the Reporter:

> "We have held that power of a court of appeals to enforce, set aside, or modify the Commission's order is an exercise of original jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit."

In support of that Court's decision, it cited:

Natural Gas Pipe Lines Co. v. Federal Power Commission, 128 F. 2d 481, 484 (7th Cir.).

This latter case cites in support of its decision:

Butterick v. Federal Trade Commission, 4 F. 2d 910, 913 (2nd Cir.);

L. B. Silver Co. v. Federal Trade Commission, 292 F. 752, 756 (6th Cir.);

Chamber of Commerce v. Federal Trade Commission, 13 F. 2d 673, 683 (8th Cir.);

Federal Trade Commission v. Baum, 23 F. 2d 615, 618 (2nd Cir.), cert. denied 277, U. S. 598;
Indiana Quartered Oak Co. v. Federal Trade Commission, 58 F. 2d 182, 184 (2nd Cir.).

In the Indiana Quartered Oak case, supra, the Court said, as to its original jurisdiction where equity demands such action, at page 184 of the Reporter:

> "* * * It places it in a position where it would be unable to fairly compete with its competitors. Under these circumstances this Court should act and will do so. An order will therefore be entered by this court modifying the order of affirmance directing petitioner to cease and desist so that petitioner will be permitted to use the term 'Philippine Mahogany * * *.'"

In **Century Metalcraft Corp. v. Federal Trade Commission**, 112 F. 2d 443 (7th Cir.), the Court held that Congress had made a grant of original jurisdiction to the Court to enforce, set aside, or modify the Commission's order and that such power carried with it authority to vacate or modify its own judgment whenever good cause is shown citing in support **United States v. Swift & Co.**, 286 U. S. 106, 110, 52 S. C. 460, 76 L. Ed. 999. In the Chamber of Commerce Case, 13 Fed. 2d 373, 683 (8th Cir.), the Court said:

> "When cease and desist orders come before a court of appeals the proceedings in such court are of an equitable nature."

In **L. B. Silver Co.** case, 292 F. 752, 753 (6th Cir.), the Court held that it had original equity jurisdiction in reviewing orders of the Federal Trade Commission. This case was cited in this Court's opinion in the Old Colony Trust Co. v. United States, supra.

It would appear, therefore, that under the facts existing in this case in line with previous decisions of this

Court and Courts of Appeals as noted above, that it becomes the duty of the Court to so exercise its equitable power to protect the rights of those that are before it.

A. The Testimony in the Record Plainly Shows the Necessity of Equitable Relief.

In overruling petitioner's motion the Court of Appeals undoubtedly overlooked the evidence in the record to the effect that almost all of petitioner's competitors use some form of volume rebate similar to that of petitioner and that it was a general practice in the automotive replacement parts industry, and that unless petitioner followed the rest of the industry they were "out of business" (R. 502).

Hubert C. Moog, Executive Vice President of Moog Industries, Inc., who had been with the Company since 1935 in all departments of the business (R. 420-421) testified:

> "We have to keep competitive at all times (R. 424). Our competitors' pricing structures are similar to our own * * * I believe it is necessary for us to exercise our present pricing practices to meet our competitors' price structures and their method of doing business" (R. 426).

His testimony is to the same effect at R. 429. Mr. Moog further testified:

> "Since we entered the piston ring field in 1935 there has been a general practice in the marketing of pistons to grant a cumulative retroactive rebate similar to the one that is now used and that practice was in effect in the industry at the time we entered * * *" (R. 444).

He further testified:

> "What we are now doing to meet competitive pricing practices in the sale of automotive products is to change our schedule wherever it is necessary to meet a situation that arises. All moves * * * that we make

> * * * are made in order to either prevent the loss of a certain group of our customers to our competition or in some way to protect ourselves in this competitive enterprise system" (R. 445).

Herbert M. Ramel, a vice president of petitioner and in that line of business since 1922, formerly a vice president of Ramsey Corporation (R. 499) testified that as to the piston ring field

> "Most all of the six large companies that I have named that do 85% to 90% of the business at the present time have either a retroactive or non-retroactive discount schedule * * *" (R. 501).

He further testified:

> "In order to meet the competition of these larger piston ring manufacturers and what in my opinion is necessary * * * to meet that competition, we just have to follow the leaders. We are helpless in the matter * * * as to what in my opinion it is necessary for us to do in the present state of market competition, the only thing you can do is * * * to follow all the practices that are now in vogue in the industry at the present time * * * we must follow the rest of the industry or we are out of business. The jobber would not handle them, and therefore, we would have no outlets for our merchandise. I have made a study of the things that jobbers do in seeking sources of supply" (R. 502).

The petitioner's gross business in 1952 was less than five million dollars (R. 474). In 1952, the gross business in the automotive replacement parts industry in the United States was two and one-half billion dollars (R. 431). Therefore, petitioner's business is less than one per cent of the gross business in the industry. Petitioner's larger competitors are numerous. Among those named in the testimony are:

Maremount Automotive Products
Tuthill Spring Co.
Burton Auto Springs
Eaton Products Co.
Ramsey Corporation
Hastings Manufacturing Co.
Sealed Power Corp.
McQuay-Norris Co.
Perfect Circle Corp.
Mopar Chrysler Co.
Regal Manufacturing Co.
Geary Hershey Co.
Shefford Master Corp.
Thompson Products
General Motors, Chevrolet Division

and are referred to in the record at pages 446, 451, 542, 462, 472, 473, 474, 475, 501 and 502. Some of Moog's smaller competitors are mentioned at page 501 of the record:

Wausau Motor Parts Co.
Superior Piston Ring Co.
Pacific Piston Ring Co.
Grant and Grant
White Machine Works

Typical contracts of some of petitioner's competitors showing volume discounts are:

Respondent's Exhibits 10B, 10C, Regal Tool and Manufacturing Co. (R. 526-528) (R. 309);

Respondent's Exhibit 16, Thompson Products, Inc. (R. 529-531) (R. 473);

Respondent's Exhibits 18A and B, Thompson Products, Inc. (R. 532-535) (R. 473);

Respondent's Exhibits 25-A, McQuay-Norris Manufacturing Co. (R. 537) (R. 477);

Respondent's Exhibit 15, Wausau Motor Parts Co.—referred to and introduced in evidence at R. 473.

It, therefore, seems obvious that if petitioner is restrained by the order of the Federal Trade Commission from following the volume discount practice of the industry they would just not be able to follow the industry and be competitive and as Mr. Ramel put it: "We are out of business."

Testimony, such as we have quoted above by the officers of petitioner, skilled in their business, as to the pricing practices and competition in the industry, should be accepted by this Court as there appears to be no reason to doubt its accuracy, and no testimony to the contrary appearing. This Court in **International Shoe Co. v. Federal Trade Commission**, 280 U. S. 291, 299, 50 S. C. 89, 91, in a similar situation to the instant one, except that the skilled witnesses testified that there was no real competition to the particular product, said:

> "* * * and where these officers skilled in the business which they have carried on, assert that there was no real competition in respect to the particular product, their testimony is to be weighed like that in respect to the other matters of fact, and since there is no testimony to the contrary, and no reason appears for doubting the accuracy of their observation or the credibility of the witnesses, their statements should be accepted."

The instant case is even stronger because we have documentary evidence to corroborate the witnesses' testimony as noted above. In an industry where price competition is so keen as appears in the instant case, the importance of meeting a competitor's price is of paramount consideration. The importance of meeting a competitor's price is dealt with in the strongest terms in Report of Attorney General's National Committee to Study the Anti-Trust Laws, March, 1955. At page 331 of that report under the paragraph headed "Meeting or Matching the Prices of Rivals," it states:

"Meeting a rival's discounts, is the means whereby competition diffuses the gains of productive efficiency. To forbid a seller to meet his rival's prices would involve *reductio ad absurdum* so long as the market structure itself is untouched."

The Constitution of our Nation requires fair play which is only equity. This Court has many times held that equity will not suffer a wrong without a remedy, regards as done that which ought to be done, and that equality is equity. **Independent Wireless Telegraph Company v. Radio Corporation of America**, 269 U. S. 459, 472, 473, 46 S. C. 166; **U. S. Rubber Co. v. American Oak Leather Co.**, 181 U. S. 441, 21 S. C. 670, 677. Your petitioner prays for this equitable treatment by this Court in order to protect practical survival of its business. Petitioner seeks equitable treatment, by this Court ordering the suspension of the order against it until similar orders can be applied to its competitors. Otherwise the very purpose of the Robinson-Patman Amendment to the Clayton Act, 49 Stat. 1526, 15 U. S. C. 13 (a), would be defeated, that purpose being the protection of small business from unfair competition by its larger competitors. If this Court should deny this relief, petitioner's larger competitors would be protected from their smaller competitor, your petitioner, and the purpose of the statute be defeated contrary to Congressional enactment.

B. **Both the United States and the Federal Trade Commission, Have Heretofore Recognized and Exercised the Protection of One Competitor Until Its Competitors Can Be Subjected to Similar Orders.**

This protection of one competitor, under an order, from its competitors until the latter can be subjected to similar orders, has been recognized and has been exercised both by the United States and the Federal Trade Commission,

by postponing effective dates of orders as to the one competitor. An order to cease and desist was entered by the Federal Trade Commission against Elizabeth Arden, Inc., in October, 1944, 39 F. T. C. Dec. 288. It was appealed to the Court of Appeals, 2nd Cir., and affirmed and the order enforced 156 Fed. 2d 132 (1946), cert. denied April 14, 1947, 331 U. S. 806. Similar complaints had also previously been filed by the Federal Trade Commission against six of its competitors. While the Elizabeth Arden case was pending, counsel for the Federal Trade Commission entered into an agreement that he would recommend to the Federal Trade Commission that it should defer compliance with the cease and desist order by any of seven respondents against whom cease and desist orders had been entered, until final action by the Court of Appeals in the the Elizabeth Arden case if Elizabeth Arden appealed, and until final action by the Commission in the last of the seven cases. In August, 1947, after this Court had denied certiorari in the Elizabeth Arden case, the Federal Trade Commission entered its order deferring the time within which Elizabeth Arden, Inc., should file its certificate of compliance until sixty days after the date that the last of the seven cases were disposed of by the Federal Trade Commission. Such action by the Federal Trade Commission recognized to the fullest extent that one competitor should not be under the restraint of a cease and desist order until its competitors, who were also violating the same law, were likewise restrained. The United States entered into somewhat similar agreements through consent decrees entered in conspiracy to restrain trade cases, and these are referred to in **Chrysler Corp. v. United States**, 316 U. S. 556, 558, 62 S. C. 1146, 1148, and **Ford Motor Co. v. United States**, 335 U. S. 303, 308-311, 69 S. C. 93, 95, 97. These consent decrees provided that if similar proceedings against General Motors should not result in conviction that the provisions of the consent decrees should be sus-

pended until such time as substantially an identical decree should be obtained against General Motors, and that if a similar decree against General Motors was not obtained by a certain date that the restraint would expire. In the Ford Motor Case, at page 307 of the U. S. Report, this Court stated:

> "Protection against competitive advantage, the appropriateness of which the government recognized, required a time certain at the end of which the restraint against Ford would expire if General Motors were still free of them."

The Federal Trade Commission and the United States recognized the extreme competitive disadvantage if one competitor were under a restraint while others were free therefrom and that is all that your petitioner asks this Court to do—to place petitioner in a position so that it can effectively compete with its competitors until they can be placed under similar orders.

The rules of the Federal Trade Commission provide for Trade Practice Conferences on application of persons or groups to eliminate on a voluntary and industry-wide basis trade practices and methods of competition in an industry which constitute violation of laws administered by the Commission. (Federal Trade Commission Rules of Practice and Procedure Subpart [c] 2.21 et seq.) While the instant case was on appeal before the Federal Trade Commission from the initial decision of the Hearing Examiner, the petitioner together with other manufacturers as one group in this industry, and a much larger group of wholesalers in this industry, filed their separate applications in April, 1954, with the Federal Trade Commission for a Trade Practice Conference for the Automotive Replacement Parts Industry, in order to formulate trade practice rules dealing with unfair methods of competition and other alleged illegal practices such as annual volume discounts.

Up to the date of the writing of this brief, forty-one (41) months have passed and the Federal Trade Commission has failed and neglected to take any action whatsoever on these applications. Petitioner, therefore, has attempted to bring about equal rules for all the industry to no avail. It appears that the Federal Trade Commission should be reminded of its rules and proceed to the achievement of one of the purposes for which it has assumed jurisdiction.

Your petitioner strongly feels that an industry that did a volume of two and one-half billion dollars in 1952 and undoubtedly is much larger today should receive more co-operation as requested above and less prosecution at the hands of the Federal Trade Commission and thereby bring trade practice harmony in many respects to an industry that would seem to sorely need its assistance. A notable example in which the Federal Trade Commission has acted in such respect was in the huge cosmetics industry. There were seven similar cases instituted in the Commission and there were some eighteen hundred concerns in the industry who were violating the same statute. The Commission ordered a Trade Practice Conference which resulted in adoption of trade practice rules as well as a settlement of all pending proceedings, and promulgated such rules in 1951, and issued amended trade practice rules in September, 1954.

As a result of cigarette advertising that made various claims as to their product, the Federal Trade Commission again in September, 1955, after investigation and consultation, promulgated a Cigarette Advertising Guide for use for its staff in cigarette advertising. Acting Chairman Robert C. Secrest of the Federal Trade Commission stated to the Legal and Monetary Subcommittee of the House Committee on Government Operations on July 26, 1957, that the adoption and administration of this guide has made marked improvement in cigarette advertising, in-

cluding filter cigarettes. As a natural result of such actions by the Federal Trade Commission, formal complaints which ordinarily require a trial are often settled by a consent order to cease and desist from the practice, as the balance of the industry are following the trade practice rules.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should suspend the order of compliance entered against petitioner by the Court of Appeals until such time as petitioner's competitors can be subjected to similar orders, such time to be fixed to a date certain. This date certain should be sufficiently far ahead to give the Federal Trade Commission sufficient time to secure similar orders against petitioner's competitors; and we suggest that the Court reserve jurisdiction so that in the event the Federal Trade Commission has not secured similar orders against all of the petitioner's competitors by the named date the Court may on application extend said date to another date certain.

Respectfully submitted,

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APPENDIX.

CONSTITUTION OF THE UNITED STATES.

Article III.

The Judicial Department.

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, * * *.

Subsection (a) of Section 2 of the Clayton Act, as Amended, by the Robinson Patman Act, 49 Stat. 1526, 15 U. S. C. 13 (a):

Section 13. Discrimination in price, services, or facilities—Price; selection of customers.

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the juris-

diction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established; And provided further, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Section 11 of the Clayton Act, as Amended, by the Robinson Patman Act, 15 U. S. C. 21:

Section 21. Enforcement provisions; procedure.

Authority to enforce compliance with sections 13, 14, 18 and 19 of this title by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by

counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a United States court of appeals, as hereinafter provided, the Commission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside

the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setti g aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of Title 28.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in this court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and

the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the Commission or Board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the anti-trust Acts.

Complaints, orders, and other processes of the Commission or Board under this section may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process, registered and mailed as aforesaid shall be proof of the service of the same. Oct. 15, 1914, c. 323, Sec. 11, 38 Stat. 734; Feb. 13, 1925, c. 229, Sec. 2, 43 Stat. 939; June 19, 1934, c. 652, Sec. 602 (d), 48 Stat. 1102; Aug. 23, 1935, c. 614, Sec. 203 (a), 49 Stat. 704; June 23, 1938, c. 601, Sec. 1107 (g), 52 Stat. 1028; 1940 Reorg. plan No. IV, Sec. 7, eff. June 30, 1940, 5 F. R. 2421, 54 Stat. 123; Dec. 29, 1950, c. 1184, 64 Stat. ...

Federal Trade Commission, Rules of Practice and Procedure, May, 1955, Subpart C—Trade Practice Conference Rules, page 17 et seq.:

SUBPART C—TRADE PRACTICE CONFERENCE RULES.

Section 2.21. **Purpose.** Trade practice rules are in the nature of advisory opinions for the guidance of businessmen. Trade practice conference rules are designed to eliminate and prevent, on a voluntary and industry-wide basis, trade practices and methods of competition and business behavior in an industry which constitute violations of laws administered by the Commission.

Section 2.22. **Content.** Rules promulgated for industries are of two classifications, namely, Group I and Group II. No rules will be promulgated for an industry which consists solely of those within the Group II classification. The Group I rules are those which define practices which are considered by the Commission to be violative of laws administered by it. They afford guidance to the industry members as to legal requirements. The Group II rules are those which reflect the industry's views and recommendations as to desirable or undesirable practices. No Group II rule will be accepted and promulgated by the Commission for an industry when containing provisions which purport to sanction any practice which is contrary to law, or which, in the opinion of the Commission, may not be in accordance with the public interest.

Section 2.23. **Application.** Application for a trade practice conference may be filed with the Commission by any interested person, party or group. Such application shall be in writing and shall be signed by the applicant or the duly authorized representative of the applicant or group desiring such conference. The following information, to the extent known to the applicant, shall be furnished with

such application or in a supplement thereto: (a) a brief description of the industry, trade, or subject to be treated; (b) the kind and character of the products involved; (c) the size or extent and the divisions of the industry or trade groups concerned; (d) the estimated total annual volume of production or sales of the commodities involved; (e) list of membership of the industry or trade groups concerned in the matter; and (f) a brief statement of the acts, practices, methods of competition or other trade practices desired to be considered, or drafts of suggested trade practice rules.

Section 2.24 **When authorized.** Trade practice conference proceedings are authorized by the Commission whenever such proceedings appear to the Commission to have possibilities (a) of constructively advancing the best interests of industry on sound competitive principles in consonance with public policy, or (b) of bringing about more adequate or equitable observance of laws under which the Commission has jurisdiction, or (c) of otherwise protecting or advancing the public interest.

Section 2.25 **Informal discussions with members of the Commission's staff.** Any interested person or group may, upon request, be granted opportunity to confer in respect to any proposed trade practice conference office, either prior or subsequent to the filing of any such application. They may also submit any pertinent data or information which they desire to have considered. Such submission shall be made during such period of time as the Commission or its duly authorized official may designate.

Section 2.26 **Industry conferences.** Due notice of the time and place of any such authorized conference shall be issued by the Commission and published in the Federal Register. A member of the Commission or of its staff shall conduct the conference pursuant to direction of the Commission and in such manner as will facilitate the proceed-

ing and afford appropriate consideration of matters properly coming before the conference. A transcript of the conference proceedings shall be made, which, together with all rules, resolutions, modifications, amendments or other matters offered, shall be submitted to the Commission for its consideration.

Section 2.27 **Public hearing on proposed rules.** After the conference, and after due consideration has been given to information developed at the conference or otherwise available, a draft of proposed rules in appropriate form shall be prepared and released by the Commission and a public hearing thereon shall be scheduled. Notice of the time and place of such public hearing thereon shall be published in the Federal Register and copies of the released proposed rules and notice shall be mailed to all members of the industry of which the Commission may have knowledge. At the hearing industry members and all other interested parties, including consumers, may appear and express their views as to the rules and may suggest such amendments, revisions, and supplementation thereto as they may consider to be desirable and appropriate. Suggestions and views of industry members and interested parties as to the proposed rules may also be submitted in writing at any time prior to the scheduled public hearing.

Section 2.28 **Publication of rules.** When final trade practice rules have been approved by the Commission, they shall be published in the Federal Register. Said rules shall become operative thirty (30) days after the date of publication or at such other time as may be specified by the Commission. Copies of the final rules shall be made available at the office of the Commission. Under the procedure of the Commission a copy of the trade practice rules is sent to each member of the industry whose name and address is available.

Section 2.29 **Voluntary compliance.** The entire procedure is aimed at voluntary observance. To encourage this, the Commission circulates to industry members with the rules an acceptance form providing opportunity to each member to signify his intention to observe the rules in the conduct of his business.

Section 2.30 **Violations.** Complaints as to the use, by any person, corporation or other organization, of any act, practice or method inhibited by the rules may be made to the Commission by any person having information thereof. Such complaints will receive the attention of the Commission and appropriate action will be taken to effect such correction as is warranted. In addition, the Commission may on its own motion take such steps to stop violations of the rules as may be proper under the circumstances. Formal complaint proceedings involving practices which are violative of trade practice rules charge violation of the statutory provision on which the rules are premised, and do not charge violation of the trade practice rule.

Section 2.31 **Amendment or repeal of rules.** Any interested person, party or group may petition for the amendment or repeal of a rule. The application shall be in writing, signed by the applicant or his duly authorized representative, and shall set forth the reasons for the requested action. When an amendment of trade practice rules for an industry is requested, the Commission may, at its discretion, direct that only a conference or hearing be held in lieu of the industry conference and hearing on proposed rules provided for in the initial establishment of trade practice rules for industries. The Commission may initiate proceedings for amendment or repeal of trade practice rules for industries on its own motion.

Section 2.32 **Effect on pending proceedings—(a) Prior to complaint.** Upon the promulgation of trade practice conference rules for an industry an examination will be

made of all charges of law violations by members of that industry then pending before the Commission which have not reached the formal stage through the issuance of complaint. In those instances in which the pending charges are adequately covered by the trade practice conference rules, and which are not excluded by the policy set forth in Section 1.51 of this chapter, the Commission will consider the advisability of closing the matters. In such instances consideration will be given to whether or not a proposed respondent has subscribed to the trade practice conference rules for his industry, to whether or not there is adequate reason to believe that he is in fact complying with such rules and will continue to do so, and to whether or not the public interest requires any further proceedings.

(b) **After complaint.** Upon the promulgation of trade practice conference rules for an industry, formal complaints which have not then been adjudicated and in which the charges are adequately covered by such rules, and which are not excluded by the policy set forth in Section 1.51 of this chapter, may be made the subject of a motion to suspend submitted pursuant to the provisions of Section 3.8 of this chapter. In ruling upon such motions, consideration will be given to factors similar to those outlined in paragraph (a) of this section with respect to informal matters.